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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Conservatorship of the Person and Estate of CORDELL JENKINS	B199837
T.L. JENKINS, Petitioner and Appellant, v. H.J. BRYANT et al., as Conservators, etc., Objectors and Respondents.	(Los Angeles County Super. Ct. No. BP086860)

APPEAL from a judgment of the Superior Court of Los Angeles County. Aviva K. Bobb, Judge. Affirmed .

Law Offices of Arezou Kohan and Arezou Kohan, for Petitioner and Appellant.

Parcells Law Firm and Dayton B. Parcells III, for Objectors and Respondents.

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INTRODUCTION

This case concerns a discovery dispute that arose in the context of conservatorship proceedings for Cordell Jenkins. Cordell's son, plaintiff and appellant T.L. Jenkins (appellant), appeals from an order imposing nonmonetary discovery sanctions upon him for violation of a prior discovery order.[1] Finding no prejudicial error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Trust*

In February 2004, Cordell created the Cordell Jenkins Family Trust (the trust) in which she named herself as trustee; son Robert and granddaughter Sharon were named successor trustees. Simultaneously, Cordell executed a will that bequeathed her entire estate to the trust and named Robert and Sharon executors. The assets transferred into the trust included Cordell's interest in certain real properties she held in joint tenancy with various of her children, including one she held in joint tenancy with appellant (the 49th Street property). The trust directed that, upon Cordell's death, Cordell's interest in the 49th Street property shall be distributed to "my sons Robert . . . and Alfred . . . . My son T.L. Jenkins [appellant] already has a 1/2 interest in the 49th Street property."

B. *The Conservatorship Case and the Successor-Trustee Case*

On July 16, 2004, appellant and Alfred petitioned for appellant to be appointed conservator of Cordell's person and estate because Cordell was suffering from Alzheimer's dementia and could no longer manage her own affairs (case No. BP086860) (the Conservatorship Case). Robert opposed appellant's appointment and asked instead that he and Sharon be appointed as Cordell's conservators.

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[1] Because the parties include Cordell's family members (sons appellant, Robert, Alfred, daughter Nicey, and granddaughter Sharon), all of whom have the same last name, we refer to them by their first names.

The probate court appointed Cordell an attorney. He recommended that: (1) Nicey, with whom Cordell had been living for the past year, be appointed conservator of Cordell's person; (2) a professional property manager be appointed to review the financial status of the real properties; (3) an independent property manager or conservator be appointed to manage the properties and a full accounting made to resolve a dispute between the siblings regarding the management of Cordell's finances; (4) Robert and Sharon be appointed successor trustees; and (5) Cordell be examined by a geriatric psychiatrist to determine whether she had the requisite testamentary capacity to execute the trust. On March 4, 2005, professional conservator H.J. Bryant (Bryant) and Nicey were appointed conservators of Cordell's estate and person, respectively.

On February 7, 2006, in the Conservatorship Case, Bryant filed: (1) a petition to have himself named as successor trustee and (2) a Statement in Lieu of First Account.

Robert and Sharon filed objections to the statement in lieu of first account. Among other things, they complained that the statement in lieu of first account did not include money that they alleged appellant had taken from Cordell without her knowledge and consent.[2]

On April 14, 2006, Robert and Sharon filed a separate action to have themselves appointed successor trustees (case No. BP097863; the Successor-Trustee Case). The Conservatorship and Successor-Trustee Cases were subsequently deemed related, but subsequent pleadings were captioned with one or the other case number.[3]

While those competing petitions to name a successor trustee were pending in both the Conservatorship and Successor-Trustee Cases, appellant filed a petition in the Conservatorship Case for Substituted Judgment to Revoke Trust; Recreate Joint Tenancy

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[2] At his deposition in September 2006, Alfred testified that Cordell stashed about $100,000 in paper bags around the 49th Street property; he previously told respondents' counsel that appellant took that money from Cordell, but was retracting that statement.

[3] See former Cal. Rules of Court, rule 804(d) [related cases], in effect at the time of the relevant proceedings; the current rule is 3.300.

Severed By Funding The Trust; and Make a Will (the petition to revoke the trust), the gravamen of which was that Cordell lacked testamentary capacity when she created the trust. Respondents and Bryant (who had already been appointed temporary trustee on July 3, 2006) objected to appellant's petition. Respondents objected on the ground, among others, that appellant had "taken considerable amounts of money from [Cordell] for his own personal gain, taken and concealed her financial records which disclose his improprieties."

C. *Discovery*

In the Conservatorship Case, on August 21, 2006, respondents propounded upon appellant, among other discovery, a demand for production of documents. At issue on appeal are the following production demands:

- "48. All records, documents, and writings referring or relating to or evidencing the checking accounts and checks from checking accounts in the name of [appellant] from 1991 to present."
- "62. All records, documents, and writings referring or relating to or evidencing the assets of [appellant] from 1991 to present."

Although his response was due on September 20, 2006, appellant served a verified answer and objections, and produced some documents, on September 25, 2006.[4] He objected to demands for production of documents Nos. 48 and 62, on the grounds of over-breath, invasion of privacy and relevance.

Counsel for respondents informed appellant's counsel that the responses were inadequate because, by failing to timely serve the responses, appellant had waived any objections to the discovery requests. In a supplemental response served on October 26th,

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[4] Although the proof of service indicates the responses were served on September 21, 2006, the envelope is date stamped September 25, 2006, by the United States Post Office. (See, e.g., Code Civ. Proc., § 1013a, subd. (3) [service presumed invalid if postal cancellation date is more than one day after date of deposit contained in affidavit].)

appellant produced some additional documents. As to demands for production of document Nos. 48 and 62, he maintained his privacy objections but produced some bank statements.

Still dissatisfied, on December 15, 2006, respondents moved to compel further response and production of documents and for sanctions in the amount of $3,015.[5] Appellant did not file written opposition. At the February 6, 2007 hearing on the motion, appellant's counsel stated: "But if the court orders me to go ahead and request those from 1991 from the bank, I will do that. I just don't know how reasonable that [is]." And: "If I have to ask my client to request those documents from his banks, then we will do that. But he doesn't have anything in his possession from those years, and that's the problem."

The trial court granted the motion to compel, but denied monetary sanctions; it answered affirmatively appellant's counsel's inquiry: "But am I to have my client request documents from 1991 from his bank? Is that what you're ordering, Your Honor?" (the February 6th order).[6]

At the hearing, appellant's counsel did not then make an oral request for a protective order allocating the cost of ordering responsive documents from the bank. Nor did appellant file a written motion for a protective order requesting such relief after he received the written notice of ruling prepared by respondents' counsel which stated that appellant was to "produce, without objection, all responsive documents to" demands for production of documents Nos. 48 and 62 on March 6, 2007, and "[w]here the Demands seek records from banks and other financial institutions, [appellant] is ordered to request and obtain from each bank and financial institution where he has had accounts at any

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5 The motion to compel was captioned with case No. BC292011, but this appears to be a typographical error as the accompanying separate statement was captioned with the Conservatorship Case number.

6 Although the record is silent as to whether appellant was present at this hearing, there is no indication that his counsel did not inform him of the discovery order.

time from 1991 to the present, all responsive documents from 1991 to the present and produce them, without objection . . . on March 6, 2007."

On March 6, 2007, appellant served a further response. As to demands for production of documents Nos. 48 and 62 he stated:

- "48. [Appellant] has conducted a reasonable and diligent search and hereby attaches documents in his possession, custody or control in response to this demand. Any additional documents including copies of checks must be ordered through the bank and will cost over $1,700.00. If the requesting party wishes to pay for them, responding party will request copies of his checks from 1991 to present upon receipt of payment from requesting party."
- "62. [Appellant] has conducted a reasonable and diligent search and hereby attaches documents in his possession, custody or control in response to this demand. Any additional bank statement has to be ordered through the bank, which will cost over $8.00 per bank statement for a total of $96.00 per year. If requesting party wishes responding party will order them upon receipt of payment."

C. *The Motion for Sanctions*

On March 9, 2007, respondents filed a motion for monetary and nonmonetary sanctions for appellant's failure to obtain and produce bank and other documents required by the February 6th order (motion for terminating sanctions).[7] The motion sought: (a) dismissal of appellant's petition to revoke the trust; (b) an order that "the issue that [appellant] took at least $265,000 in cash from Cordell Jenkins without her knowledge and consent is established, and that any interest [appellant] has in any real estate was

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[7] Although the discovery order was made in the Conservatorship Case, respondents' motion for terminating sanctions was captioned with the case number of the Successor-Trustee Case. That this was also a typographical error of no significance to the appeal is demonstrated by the fact that appellant's opposition to the motion for terminating sanctions bore the Conservatorship Case number.

obtained with monies that he took from Cordell Jenkins without her knowledge and consent is established;" (c) an order precluding appellant from introducing any evidence on these issues; and (d) monetary sanctions in the amount of $6,730.

In written opposition to the motion, appellant argued that the February 6th order required him to order checks and bank statements from his banks, but did not require him to pay "over $2,500.00 for the cost of getting those records. He does not have monies to pay for such outrageous requests. [Appellant] has no objection to order the statements upon receipt of costs from the moving party. It would take about 7-15 days for the bank to provide them. [Appellant] has already spent many hours of time and money to respond to the irrelevant and overbroad discovery requests of the moving party. [¶] [Appellant] and his counsel kindly request that the Court puts an end to this harassment by the moving party who is doing nothing by billing as an outrageous hourly the assets of this estate. If they would have only called and agreed to pay for the costs it would have been less costly and would not have taken the Court's time."

At the March 21, 2007 hearing, appellant's counsel argued that at the time the order was made, appellant and his counsel were unaware of the cost of obtaining the documents: "We don't have a problem to do so [order the documents from the bank], but who's going to pay for all of that? It's a lot of money." Respondents' counsel countered that appellant had waived any objections, including objections to the cost of compliance. And counsel for Bryant argued that giving appellant another opportunity to comply was unrealistic in light of the April 23rd trial date and prior continuance order that stated no further continuances would be granted.[8]

The probate court granted respondent's motion for terminating sanctions in the Conservatorship Case, observing: "The whole issue is that you didn't follow the court's

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[8] Trial had been continued several times since the original date of August 2, 2006. In January 2007, the parties stipulated to continue the trial to April 23, 2007, and to base the discovery cut-off date on the new trial date; the probate court agreed to the stipulation but interlineated the written order with the words "with absolutely no further continuances."

order. And if you had a problem, you could have come back to court and asked for a change. The court made an order. You didn't follow it. It's over." Although respondents' counsel argued that the Successor Trustee and Conservatorship Cases were related, the probate court denied any sanctions in the former because the discovery had been sought only in the Conservatorship Case.

On April 6, 2007, over appellant's objection, the probate court signed a written order (the April 6th order), awarding monetary sanctions in the amount of $2,500 and "striking all of [appellant's] pleadings."[9] In addition, the April 6th order states: "[Respondents'] request for an order imposing evidentiary and issue sanctions against [appellant] is granted. It is hereby ordered that it is taken as established that: (a) [Appellant] took at least $265,000 in cash from Cordell Jenkins without her knowledge and consent; and (b) any ownership interest [appellant] has in any real estate was obtained with monies that he took from Cordell Jenkins without her knowledge and consent. [Appellant] is prohibited from introducing anything in evidence related to these designated matters." The probate court subsequently denied appellant's motion to vacate the April 6th order pursuant to section 473, subdivisions (b) and (d).

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9 Although respondents' motion sought only to have the petition to revoke the trust stricken, the order struck *all* of appellant's pleadings in the Conservatorship Case. Although this would necessarily include appellant's petition to be appointed Cordell's conservator which initiated the Conservatorship Case, the order did not resolve the Conservatorship Case. This is because by the time appellant's pleadings in the Conservatorship Case were stricken, there was a court-appointed conservator and he was seeking approval of a statement in lieu of accounting and to be appointed successor-trustee in the context of the Conservatorship Case. Moreover, striking appellant's pleadings had no effect on the related Successor-Trustee Case brought by Robert and Sharon.

E. *The April 23, 2007 Hearing*

Although appellant's pleadings in the Conservatorship Case had been dismissed, other matters remained set for trial on April 23, 2007.[10] Nevertheless, appellant and his counsel did not appear on April 23rd, despite having notice of the proceedings. Bryant, Nicey, Robert, Sharon, Alfred, and their counsel were present, as was Cordell's appointed counsel. Based on the appearing parties' stipulation, the probate court made various findings and orders, which were set forth in a written order filed August 8, 2007. Pursuant to the stipulation of the appearing parties, the court found, among other things:

- The trust was valid;
- Appellant's petition to revoke the trust had been stricken;
- The trust provided for distribution of various assets of the trust including the 49th Street property;
- Bryant had requested, but appellant had not delivered, an accounting of the 49th Street property; and
- The trust did not contain a residual distribution clause.

Based on these stipulations, the probate court ordered:

- Robert's and Sharon's petition to be appointed successor trustees was denied;
- Bryant's request to be appointed successor trustee was approved;
- Bryant's statement in lieu of accounting was approved;
- All assets of the conservatorship estate were deemed assets of the trust;
- Based on the April 6th order, Bryant was ordered to "take such action as may be reasonable to seek enforcement of the sanctions set forth in that Order, including the following: [¶] a. A Partition action to cause the sale of the 49th Street

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10 Of the five matters set to be heard on April 23rd, four were in the Conservatorship Case and one in the Successor-Trustee Case. The Conservatorship Case matters were: (1) Bryant's petition to be named successor-trustee; (2) Bryant's petition for approval of the statement in lieu of accounting; (3) a petition regarding title to a property held jointly by Cordell and Sharon; and (4) appellant's petition to revoke the trust. In the Successor-Trustee Case, it was Robert and Sharon's petition to be named successor trustees.

Property; [¶] b. A Section 850 Petition to seek recovery of [appellant's] interest in the 49th Street Property and to recover assets in the amount of at least $265,000 and other real estate interests in [appellant's] name deemed to have been taken from Cordell without her knowledge or consent;"

- The trust would be amended such that, upon Cordell's death, the proceeds in the various properties would be distributed between certain heirs, not including appellant (thus, effectively disinheriting appellant);
- The trust was amended to add a residual clause distributing assets not otherwise distributed to Robert, Nicey, and Alfred; and
- Specific orders were also made regarding other real properties owned by the trust.

Appellant filed a timely notice of appeal.

DISCUSSION

A. *Standard of Review*

Failing to respond to an authorized method of discovery and disobeying a court order to provide discovery are both misuses of the discovery process. (Code Civ. Proc., § 2023.010, subds. (a), (d) & (g).) The sanctions, that a trial court may impose for a misuse of the discovery process range from monetary sanctions to evidence preclusion, issue preclusion and, finally, "terminating sanctions" such as dismissal of the action. (Code Civ. Proc., § 2023.030.)

We review a trial court's order imposing discovery sanctions under the deferential abuse of discretion standard. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1217 [affirming evidence preclusion sanction].) We "presume the court's order is correct and indulge all presumptions and intendments in its favor on matters as to which the record is silent. [Citation.]" (*Ibid*.) We will affirm unless the order is arbitrary, capricious, whimsical or demonstrates a manifest abuse exceeding the bounds of reason. (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.) However, since the trial court's discretion must be based on substantial evidence, we must first determine whether

substantial evidence supports the factual basis on which the trial court acted, and then determine whether the orders made by the trial court were an abuse of discretion in light of those facts. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.)

B. *There Was Substantial Evidence That Appellant Willfully Violated the February 6th Order*

Appellant contends that the finding that he willfully violated a court order was not supported by substantial evidence. He argues that there was no express finding by the probate court that he willfully violated the February 6th order (i.e., that he had no intention of complying with the order) and no substantial evidence that he did so. To the contrary, appellant asserts that he "agreed to comply" by virtue of his offer to produce the documents on the condition that respondents paid the cost of obtaining them. The record is to the contrary.

"A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction. [Citation.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280 (*Mileikowsky*).) A violation may be deemed "willful" if the party understood its obligation, had the ability to comply, and failed to comply. (*Fred Howland Co. v. Superior Court* (1966) 244 Cal.App.2d 605, 610-611.) No intention to violate the discovery rules is required; a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance, is sufficient. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 787-788.)

It cannot be disputed that the February 6th order required appellant to obtain responsive documents from his banks and other financial institutions and to produce them *without objection* on March 6th. It is undisputed that appellant did not obtain the requested documents, much less timely produce them. Instead, on the date production was ordered to occur, appellant offered to produce the documents upon the condition that respondents pay the associated costs. Appellant's failure to obtain from his bank and

timely produce responsive documents constitutes substantial evidence that he violated the February 6th order. That he did so willfully is a reasonable inference from the fact that he offered to comply on the condition that respondents' pay the associated costs; in other words, he understood that respondents were entitled to the documents but he did not produce them because he unilaterally decided that he should not have to pay for them. Although appellant maintains that his conditional offer to produce documents constitutes substantial compliance with the February 6th order, the probate court did not agree, as is demonstrated by its statement: "The whole issue is that you didn't follow the court's order. And if you had a problem, you could have come back to court and asked for a change. The court made an order. You didn't follow it. It's over." Thus, there is substantial evidence that appellant willfully violated the February 6th order.

Appellant's reliance on *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, for a contrary result is misplaced. In that case, the trial court dismissed the plaintiff's complaint after he failed to reasonably respond to a document production request. The appellate court reversed because there had not been a prior court order to comply with the document production request (although there had been other discovery orders), and disobedience of a prior order is a prerequisite for dismissal based on discovery abuse. (See also *Mileikowsky, supra*, 128 Cal.App.4th at p. 278 ["We have found no appellate authority which disagrees with *Ruvalcaba*'s analysis"].) *Ruvalcaba* is inapposite because here that prerequisite was met by appellant's failure to comply with the February 6th order.

C. *The Probate Court Implicitly Found Appellant Did Not Misunderstand the February 6th Order or the Law*

As we understand appellant's next contention, it is that the probate court erred in imposing terminating sanctions (i.e., dismissal of the pleadings) based upon appellant's "misunderstanding of the order or the law." The argument is without merit.

Appellant asserts that his failure to comply with the February 6th order was a result of his counsel's "genuine understanding that (a) under California law, a party's

bank records are not deemed to be within a party's 'control,' and (b) the order only required that Appellant request the bank records and checks from 1991 to the present, and did not require Appellant to pay for them." Implicit in the probate court's finding that appellant willfully violated the February 6th order is a finding that the violation was not a result of a "genuine misunderstanding." This was a reasonable inference from the evidence.

First, while there is no California case defining possession in the context of Code of Civil Procedure section 2031.010, that section is based on rule 34 of the Federal Rules of Civil Procedure (28 U.S.C.). (See 2 Witkin, Cal. Evidence (4th ed. 2000) Discovery, § 118, p. 958 [former Code Civ. Proc., § 2031 is based on Fed. Rules Civ.Proc., rule 34, 28 U.S.C.].) "Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1288.) In the context of rule 34, "control" is defined as the legal right to obtain documents upon demand. (See *In re Citric Acid Litigation* (9th Cir. 1999) 191 F.3d 1090, 1107.) That appellant's counsel understood that appellant's bank records were in appellant's control within the meaning of Code of Civil Procedure section 2031.010 is demonstrated by the fact that counsel obtained an affirmative response when he specifically asked the probate court whether appellant was required to obtain responsive documents from his bank.

Second, the general rule is that the responding party bears the expense of producing documents in response to a discovery request, although the demanding party may be required to pay "significant ' "special attendant" costs beyond those typically involved in responding to routine discovery.' [Citation.]" (*Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, 769.) The question, however, is properly addressed to the trial court by way of a motion for protective order. (*Ibid*.) In light of this general rule, the probate court could reasonably not credit the claim that appellant's counsel genuinely believed it was proper to unilaterally condition

compliance with the February 6th order on respondents paying the cost of compliance, rather than move for a protective order to that affect.

D. *Although Imposition of Terminating Sanctions Was an Abuse of Discretion, Appellant Was Not Prejudiced*

Appellant contends the sanction of dismissal was excessive. He argues that it was not sufficiently tailored to prevent discovery abuse and correct the problem presented. We agree, but find no prejudice.

"It is well established 'the purpose of discovery sanctions "is not to 'provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits,' " . . . but to prevent abuse of the discovery process and correct the problem presented.' " (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 300.) A trial court may impose discovery sanctions that ' " 'are suitable *and necessary* to enable the party seeking discovery to obtain the objects of the discovery he [or she] seeks but the court *may not* impose sanctions which are designed *not to accomplish the objects of the discovery but to impose punishment' " '* [Citations.]" (*Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 332.) The preference is for less severe sanctions to be imposed first and sanctions of escalating severity imposed for continuing discovery abuse. (2 Witkin, Cal. Evidence, *supra*, § 251, p. 1069.) Dismissal is a proper sanction if the court's authority cannot be vindicated through imposition of less severe sanctions. (*Rail Services, supra*, 110 Cal.App.4th at p. 331; but see *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1106 ["The question before us ' "is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose." ' [Citations.]"].)

Here, the imposition of a terminating sanction was excessive because there was no long history of discovery abuse – appellant had violated only the February 6th order – and there was no showing that the less severe evidence and issue preclusion sanctions,

which were also imposed, would not produce compliance with the discovery rules. (*Mileikowsky, supra*, 128 Cal.App.4th at pp. 279-280.)

But this does not end our inquiry because to warrant reversal appellant had to show a reasonable likelihood of a more favorable outcome absent the error. (*Valbona v. Springer* (1996) 43 Cal.App.4th 1525, 1548-1549; Cal. Const., art. VI, § 13.) He failed to meet this burden. First, it is not reasonably likely that had appellant's pleadings not been dismissed, he would have obtained a more favorable result on either his petition to be made Cordell's conservator or his petition to revoke the trust, make a new will and recreate his interest in the 49th Street property that was extinguished by Cordell's estate plan. This is because the evidence and issue preclusion sanctions, which we have upheld, established that appellant took money from Cordell without her knowledge or consent and used it to purchase real estate (e.g., his interest in the 49th Street property). Under these circumstances there is no reasonable likelihood that appellant would have prevailed on either petition.

Second, notwithstanding that his petitions to be made conservator and to revoke the trust had been dismissed, appellant elected not to appear at the April 23rd hearing at which various matters relating to Cordell's estate but unrelated to appellant's dismissed pleadings were heard. These matters included Bryant's petition to be named successor-trustee, payment of fees to Bryant and his attorney, approval of Bryant's statement in lieu of first accounting, matters relating to other properties in which Cordell had an interest, transfer of certain properties into the trust and amendment of the trust to include a residual distribution clause. By not appearing, appellant forwent the opportunity to object to the stipulation and concomitant probate court findings and orders. Appellant cannot show a reasonable likelihood of a more favorable result on these matters if the pleadings had not been dismissed since nothing prevented him from appearing and contesting these matters.

E. *Appellant Was Not Denied Due Process*

Appellant contends he was denied due process as a result of the trial court entering an order establishing that (a) appellant took $265,000 from Cordell without her knowledge and consent, and (b) any ownership interest appellant had in real estate was obtained with monies he took from Cordell without her knowledge or consent; and precluding appellant from introducing any evidence to the contrary. Relying on Code of Civil Procedure section 580, subdivision (a) and *Greenup v. Rodman* (1986) 42 Cal.3d 822 (*Greenup*), he argues that the probate court improperly entered a default judgment in an amount greater than the amount stated in the complaint – since neither the petition to confirm Sharon and Robert successor trustees nor respondents objection to appellant's petition to revoke the trust specified an amount of monetary damages against appellant. The argument misses the mark.

Code of Civil Procedure section 580, subdivision (a) provides that, if there is no answer, the plaintiff cannot obtain relief exceeding that demanded in the complaint. Its purpose is to guarantee defaulting parties notice of the maximum judgment that may be assessed against them. (*Greenup, supra*, 42 Cal.3d at p. 826.) In *Greenup*, the court held that Code of Civil Procedure section 580, subdivision (a) applies to defaults obtained as a result of an answer being stricken as a sanction for discovery abuse. (*Id*. at p. 828.)

But *Greenup*'s application is limited to default judgments. For example, in *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613 (*Johnson*), a wrongful death action, the trial court imposed issue and evidence preclusion sanctions, and struck the defendant's answer except as to the issue of damages, all as discovery sanctions. (*Id*. at p. 621.) Based on the issue and evidence preclusion sanctions, it granted the plaintiff's summary adjudication motion. A jury trial on damages resulted in an award of $4.9 million. The appellate court rejected the defendant's contention that, under *Greenup*, because the defendant's answer was stricken, the plaintiff's recovery should have been limited to the $25,000 jurisdictional limit pleaded in the complaint. The court in *Johnson* explained that, unlike the defendant in *Greenup*, the defendant in

Johnson "did not achieve a default; it was simply deprived of the right to litigate the issue of liability." (*Johnson*, at p. 624.)

Here, as in *Johnson*, appellant did not achieve a default. He simply had certain issues established against him and was precluded from introducing evidence to the contrary. He had every opportunity to appear at the April 23rd hearing and litigate whether Bryant should be made successor trustee and given the authority to pursue recovery from appellant. Accordingly, *Greenup* is inapplicable to the facts of this case.

DISPOSITION

The April 6th order dismissing appellant's pleadings and imposing other sanctions in the Conservatorship Case is affirmed. Respondents to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

WE CONCUR:

COOPER, P. J.

BIGELOW, J.